It is not right that the Court should have to comb the evidence or draw debateable inferences on such a point. It should have appeared on the face of the deposition, in case the medical man was not available at the trial. If it was overlooked then, it certainly should have been made good at the trial. Any text book on medical jurisprudence begins the chapter on examination of the person, living or dead, with the question of identification. It ought to be brought home to Medical Officers and, more especially, to Deputy Public Prosecutors that if they omit such an elementary precaution they may raise either a question as to their professional competence or an inference of irresponsible negligence.

The appeal is dismissed but the minor conviction will be formally amended to one for voluntarily causing grievous hurt by shooting and the sentence therefore reduced to three years.

Appeal dismissed. Sentence reduced.

LIM KWEE GEOK v. R.

[A. Cr. J. (Spenser Wilkinson, J.) December 15, 1952]

[Penang — Criminal Appeal No. 49 of 1952]

Penal Code, s. 411 — Evidence — Evidence of accomplice — Corroboration — Degree of corroboration required.

The accused was charged with dishonestly receiving stolen property, to wit, 30 cases of milk, which were found in the possession of a proprietor of a shop. The proprietor stated that he had bought the milk from the accused at a price below the usual price and that he gave the accused a cheque in settlement which also included a sum stated by the accused. At the trial, the proprietor produced his account books after being asked in cross-examination and the books showed that the entries relating to the milk were extremely suspicious. The accused completely denied that he sold the milk.

The question was whether the proprietor was an accomplice and whether there was sufficient corroborative evidence.

Held: (1) the proprietor was not only an accomplice but an accomplice of a type upon whose evidence as a witness it is most unsafe to convict without strong independent corroboration; (2) it is imperative in a case of this kind for a Magistrate to find which of the witnesses are accomplices (if there is any doubt about it) and whether there is any, and if so, what kind of corroboration of their evidence.

Case referred to:—

(1) *Chop Yong Siang v. Lim Yam Hong* 14 S.S.L.R. 152

CRIMINAL APPEAL.

R. D. Hume for the appellant.

C. M. Sheridan (D.P.P.) for the respondent.

Spenser Wilkinson, J.: — The Manager of Nestle's Products, Penang received information that tins of Milkmaid Sweetened Condensed Milk ex s.s. "Socotra" which had arrived in Penang on the 10th August, 1952 were being sold in Penang and made a report about this to the police. On the same day Mr. Wright, the O.C.P.D. Port, Penang went to the accused's shop in Perak Road and searched his shop. Nothing incriminating was found there. He then went to the shop of Lu Iu Chun, proprietor of Chop Eng Hong at 109, Cintra Street, Penang and there found some 28 cases of Nestle's milk, which Mr. Brittain was able to identify by certain marks as being part of the consignment of milk shipped in the "Socotra". It is not disputed that there was ample evidence that these cases of milk had in fact been stolen.

Lu Iu Chun being thus found in possession of these stolen goods explained that he had bought 30 cases of milk from the accused who had brought them to his shop in a lorry at 8 a.m. on the 11th August, 1952. According to Lu Iu Chun the milk was offered to him at $29 per case, this being $2.50 per case below the usual price and he gave the accused a cheque for $1,300, which was a sum $430 above the total price of the milk, the $430 being a loan to the accused which was repaid on the 13th August, 1952.

The accused was thereupon charged with dishonestly receiving stolen property in Penang Harbour under section 411 of the Penal Code and the explanation of Lu Iu Chun outlined above was the gist of the evidence he gave in Court at the trial as 4th Prosecution Witness. In support of his evidence Lu Iu Chun produced the cheque for $1,300, the counterfoil and a document purporting to be signed by the accused which reads as follows:—

"I hereby promise to sell Eng Hong 30 cases of 'Milkmaid Brand' tinned milk for $870. Received in advance one Ban Hin Lee's cheque No. 172577 for $1,300.

After deducting the cost for the milk, a balance of $430 is still with me.

(Signed) Lim Koo Geok
11.8.52."

Lu Iu Chun did not produce his books as part of his evidence in chief but when cross-examined thereon stated that he could produce his books and subsequently did so. The learned Magistrate makes the following remarks regarding these books in his judgment:—

"In all three of these books, the entry covering the milk transaction is extremely suspicious. In the ledger, at page 10, under the date 12.8.52, the original figure of $104.23 has been altered to $974.23 — a difference of $870.00 which was the price of the milk. In the Day Book, at pages 58, 59, an entry for 'Milk — $870.00' occurs over an erasured 㓁 仃 in the last column of page 58. The two characters erased are used throughout this book in the last column of a page whenever the clerk, for one reason or another, does not wish to make an entry in this column. Further, in the first column of page 59, the total for the day — $982.33 — is made to conform with the additional $870.00 and is written over an earlier total no longer legible. And, finally, the total

for the week ending 17.8.52 — $6,288.50 — is also made to conform with this additional $870.00 and is also written over an earlier total no longer legible. In the Goods Received Book the milk item is inserted in the final column of a page in a different ink. I find that all the milk entries in these accounts, although appearing under 12.8.52, were made later, certainly after 17.8.52 and probably after the milk had been seized on 26.8.52. Lu Iu Chun's motive for faking his accounts is obvious. As soon as he lost the milk he was anxious to establish his claim against accused for the return of the purchase money. He must have known he was dealing in stolen property and did not at first wish to have any reference to it in his books, but when he seemed in danger of losing his $870.00 he took rather crude steps to bolster up his claim for its recovery."

The defence of the accused was a complete denial that he had ever had this milk or had sold it to Lu Iu Chun and he denied that the signature on the receipt Exhibit P. 5 was his signature. With regard to the cheque for $1,300 he admitted having received this on the 11th August, 1952 but stated that the whole amount was a loan and that he had paid $13 interest thereon.

Counsel for the appellant submitted that the evidence of Lu Iu Chun was wholly unworthy of credit and should not have been accepted by the learned Magistrate on any point. He argued that this witness lied in his evidence regarding this receipt when he stated that the Police did not ask for production of the receipt until after he had given them the cheque and the counterfoil and that he was asked for the cheque and the counterfoil first, and submitted that the whole of his evidence regarding the account books was also false. He further submitted that the learned Magistrate should have held that the receipt Exhibit P. 5 was a forgery.

Dealing first with this last point I doubt if it was incumbent upon the Magistrate to decide one way or the other whether the receipt Exhibit P. 5 was a forgery; for if he had a reasonable doubt as to its genuineness the accused would have been given the benefit of that doubt and the receipt ignored. If on the other hand the Magistrate had no doubt as to the genuineness of the receipt then it could no doubt be looked upon as corroboration of Lu Iu Chun's evidence. The learned Magistrate appears to have adopted the latter view, but the reasons he gives for so doing are open to criticism.

As regards the evidence of Lu Iu Chun generally, it is clear from the passage above quoted that the learned Magistrate very carefully considered the criticism levelled against it by reason of the alterations to the books. But on the further question of whether or not his evidence was unworthy of credit by reason of his being an accomplice he tells us very little. The passage in his Grounds of Decision dealing with this point reads as follows:—

"In view of the nature of the defence it was not argued before me that the prosecution was relying on the evidence of an accomplice. I think there can be no doubt that Lu Iu Chun knew the milk was stolen. One small shopkeeper does not offer 30 cases of milk to another small shopkeeper at $2.50 per case below a fixed market price. But even if Lu Iu Chun can be deemed to be an accomplice, I think there is sufficient corroborative evidence to support his testimony."

From the expression "even if Lu Iu Chun can be deemed to be an accomplice" it would appear that the learned Magistrate entirely failed to observe that this witness was not only an accomplice but an accomplice of the very type which the Courts have always looked upon as witnesses upon whose evidence it is most unsafe to convict without corroboration. Here was a man found in possession and proved to have been in possession of stolen goods very soon after the theft and if prosecuted, unless he could convince the Court of the genuineness of his explanation, he was liable to be convicted of this serious offence. His whole interest, therefore, in giving evidence against the accused must have been to make the case against the accused as black as possible in order to exonerate himself. In my opinion it would be quite unsafe to convict on the evidence of such a witness without strong independent corroboration.

It is true that the learned Magistrate stated that he thought there was sufficient corroborative evidence to support his testimony, but he has not told us what evidence he looks upon as constituting such corroboration. In the case of *Chop Yong Siang v. Lim Yam Hong*[1] it was laid down that it is imperative for a Magistrate in a case of this kind to find in his Grounds of Judgment which of the witnesses are accomplices (if there is any doubt about it) and whether there is any, and if so, what kind of corroboration of their evidence. In the present case there were two witnesses who gave evidence corroborative of the evidence of Lu Iu Chun. Both these witnesses, however, were employees of Lu Iu Chun and to what extent they could be said to be independent and to what extent their evidence was worthy of credit was a question of fact for the learned Magistrate who heard their evidence. This is a matter upon which I feel it is not possible for me to express any opinion without some guidance from the Magistrate who saw and heard them. As I have remarked above the grounds upon which the learned Magistrate came to the conclusion that the receipt was genuine appear to me to be open to criticism and if this was the only corroboration upon which he relied I would have doubts as to its sufficiency.

It appears to me that the learned Magistrate did not really set his mind to considering the vital question of whether Lu Iu Chun, being an accomplice, his evidence was sufficiently corroborated, or if not, whether without corroboration he was to be believed. Indeed,

my impression is that he did not really regard him as an accomplice at all. For this reason I do not think the conviction can stand.

The question then arises whether or not I ought to order a retrial. I can find very little authority to guide me on this point in the present case. This is not a case in which the prosecution is asking the appellate Court to cure a defect in their case by having a second attempt to prove it in another trial with the assistance of further evidence. It is true that the Deputy Public Prosecutor suggested that better evidence in the shape of expert evidence on handwriting might be given regarding this receipt, but there is nothing to indicate at the present stage whether such evidence would be favourable to the prosecution or to the defence. Moreover, if it were merely a question of further evidence regarding the signature on this receipt this could be dealt with by further evidence being given on the appeal. I do not think this would resolve the difficulty.

The position appears to me to be that there was the evidence of an accomplice and there was certain other evidence before the Court which may or may not have been accepted and which, if accepted, might have been sufficient corroboration of the evidence of the accomplice. If the learned Magistrate believed the evidence of Prosecution Witnesses 11 and 12 then there was corroboration of the accomplice; if that evidence was not believed then the question remains in doubt. The whole difficulty arises from the learned Magistrate not having gone fully in his Grounds into this question of accomplice evidence and corroboration. In these circumstances I think the interests of justice would be best served by ordering a fresh trial.

Before parting with this case I would remark that I think it somewhat unfortunate that in the circumstances of this case Lu Iu Chun was called as a Crown witness before being himself proceeded against in respect of his part in the affair. Had Lu Iu Chun been charged with receiving or retaining stolen property he would have been convicted or acquitted or discharged, and had this been done such evidence as he then might have given against the accused would not have been tainted to anything like the extent that it was in the proceedings now before me.

For the reasons above given I set aside the conviction and sentence and order that the accused be retried before another Magistrate.

Conviction set aside; retrial ordered.

PUBLIC PROSECUTOR v. M. KARTHIAH.

[A. Cr. J. (Spenser Wilkinson, J.) July 8, 1949]

[K.L. — Criminal Appeal No. 28 of 1949]

Motor Vehicles (Driving Offences) Proclamation, s. 6 — Driving under influence of drink — Disqualification — Special reasons.

The accused had been convicted and fined $100 on his plea of guilty for driving while under the influence of drink under section 6 of the Motor Vehicles (Driving Offences) Proclamation. Sub-section (2) of section 6 provides that a person convicted under the section shall be disqualified for a period not less than 12 months unless special reasons are shown. The learned Magistrate did not suspend the accused's licence for the reason that the accused did not know of any way of earning his livelihood other than driving a motor car.

Held: (1) following **Whittal v. Kirby**(1), this was not a special reason sufficient to excuse the accused from disqualification. A "special reason" is one which is special to the facts which constitute the offence. A circumstance peculiar to the offender as distinguished from the offence is not a "special reason" within the exception; (2) the circumstance peculiar to the offender might have been taken into consideration in imposing fine or imprisonment according to the discretion of the Magistrate, having in mind also the circumstance which the accused will be in consequent on the disqualification; (3) where the Court refuses to disqualify it should state the facts which are found to constitute special reasons.

Cases referred to:—

(1) *Whittal v. Kirby* (1947) 1 K.B. 194; (1946) 2 All E.R. 552.

(2) *R. v. Crossan* (1939) N.I. 106.

(3) *Duck v. Peacock* (1949) 1 All E.R. 318.

(4) *Reay v. Young & anor.* (1949) W.N. 242; (1949) 1 All E.R. 1102.

(5) *R. v. Recorder of Leicester* (1946) 1 All E.R. 615.

CRIMINAL APPEAL.

C. H. Whitton (D.P.P. as he then was) for the Public Prosecutor.

Respondent in person.

Spenser Wilkinson, J. : — This was an appeal by the Public Prosecutor against the decision of the Magistrate in Kuala Lumpur upon the ground that the sentence imposed was inadequate, in that the respondent was not disqualified from holding or obtaining a driving licence for a period of not less than twelve months.

The respondent pleaded guilty to and was convicted of driving a motor car on the public road whilst under the influence of drink under the provisions of section 6 of the Motor Vehicles (Driving Offences) Proclamation. The Magistrate imposed a fine of $100.

It was submitted on behalf of the Public Prosecutor that the Magistrate should have disqualified the